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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

DONNIE WAYNE DODSON, :
PETITIONER :

-versus- :

THE STATE OF GEORGIA, :
RESPONDENT :

76-883

CASE #_____

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF

THE STATE OF GEORGIA

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NO. _____

DONNIE WAYNE DODSON

PETITIONER

-VERSUS-

THE STATE OF GEORGIA

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF

THE STATE OF GEORGIA

Petitioner respectfully prays that a Writ of Certiorari issue to review the Final Judgment of the Supreme Court of Georgia entered on the 8th day of September, 1976.

OPINION BELOW

The Judgment of the Supreme Court of Georgia from which a review is sought was entered on the 8th day of September, 1976,

and a Motion for Rehearing was filed by the Petitioner on the 14th day of September, 1976, and was denied by the Supreme Court of Georgia on the 28th day of September, 1976. The Notice of Appeal to the Supreme Court of the United States was filed on the 12th day of October, 1976, in the Supreme Court of Georgia. The official opinion of the Supreme Court of Georgia is recorded in the case of DONNIE WAYNE DODSON vs. STATE OF GEORGIA, being No. 31,332, in 237 Ga. 607--610. The opinion is attached hereto and made a part hereof as Appendix "A." The decision of the Georgia Supreme Court affirmed the judgment of conviction of the Petitioner rendered in the Superior Court of Gordon County, Georgia, on March 16, 1976. THE DEFENDANT WAS SENTENCED TO FIFTEEN (15) YEARS IN THE STATE PENITENTIARY OR SUCH OTHER PLACE AS THE BOARD OF CORRECTIONS MAY DETERMINE. (R. 23)

JURISDICTION

The Final Judgment of the Georgia Supreme Court affirming the Petitioner's conviction was entered on the 8th day of September, 1976. Since substantial federal questions arising under the Constitution of the United States were involved in this case, the jurisdiction of this Court is invoked under the provisions of Article III, Section II, of the Constitution of the United States and 28 U.S.C.A. §1257(2) and 28 U.S.C.A. 1257(3).

QUESTIONS PRESENTED

(1) Was the Petitioner deprived of his right to a fair trial and to Due Process of Law under the Fifth and Fourteenth Amendments to the Constitution of the United States when he was subjected to a "show-up" at the Gordon County Jail approximately one-half (1/2) hour after his arrest and after the commission of the alleged offense, which procedure was so unnecessarily

suggestive as to result in mistaken identification at the trial of the Petitioner?

(2) Was the Petitioner deprived of a fair trial and to Due Process of Law under the Fifth and Fourteenth Amendments to the Constitution of the United States when the Trial Judge admitted the in-court identification by the eye-witnesses Guy Harris and Evelyn Harris without first determining whether or not it was tainted by the illegal "show-up" and other identification procedures or whether it had an independent origin?

(3) Was the Petitioner deprived of his right to a fair trial and to Due Process of Law under the Fifth and Fourteenth Amendments of the Constitution of the United States when the District Attorney knowingly used perjured testimony by two eye-witnesses who misidentified the Petitioner at the trial as the perpetrator of the armed robbery when they had previously

identified his brother, a co-defendant, in statements to the chief investigator and at a prior preliminary hearing?

(4) Was the Petitioner deprived of effective assistance of Counsel under the Sixth Amendment to the Constitution of the United States and to a fair trial under the Fifth and Fourteenth Amendments to the Constitution of the United States when his attorney failed to properly impeach the State's two eye-witnesses and to introduce evidence of an exculpatory nature which would have been materially favorable to the Petitioner and to make an objection to the eye-witness identification so as to preserve that issue for appeal.

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES; SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES; AND FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated as follows:

A. STATEMENT OF PLEADINGS IN THE CASE: The Petitioner along with his brother, Dennis Eugene Dodson, was indicted by the Grand Jury of Gordon County and charged with the offense of Armed Robbery, which offense allegedly occurred on September 24, 1975. The Petitioner and his brother were charged with stealing certain currency and a .38 caliber pistol which belonged to Guy Harris, d/b/a Duke Oil Station, by the use of a pistol. (R. 2, 3) The Petitioner entered a plea of Not Guilty and after a trial by jury was found Guilty on March 16, 1976. (R. 22) On March 25, 1976, the Trial Judge sentenced the Defendant to serve fifteen (15) years in the penitentiary. (R. 23) On March 30, 1976, the Petitioner filed a

Notice of Appeal to the Supreme Court of Georgia in the Gordon County Superior Court. (R. 1)

B. STATEMENT OF FACTS: Petitioner was represented at the trial by an attorney. His attorney represented him at a preliminary hearing which was held on October 23, 1975. (Preliminary Hearing Transcript, R. 24, 25) At this preliminary hearing, the Petitioner appeared in person with his appointed attorney, and the State of Georgia for identification purposes used a photograph of his brother Dennis Eugene Dodson, the co-defendant, which was marked as State's Exhibit No. 1. (Preliminary Hearing Transcript, R. 38)

At this preliminary hearing and later at the trial, the State produced the only two eye-witnesses to the alleged crime, Guy Harris and his wife, Evelyn Harris.

Guy Harris testified at the preliminary hearing and at the trial that on September 24,

1975, while he was working at the Duke Oil Station in Gordon County, a white van pulled into the station. He testified that he went out and told the driver of the van to pull around to the pumps so that gas could be pumped into the vehicle, and as he did one of the two occupants of the van got out and went into the building and purchased a candy bar from his wife. Harris was told by the driver of the van how much gasoline was desired, and he told his wife to pump it into the van since he had just gotten out of the hospital. When he had gone back onto the building and his wife had left the gas station building, the one who had gone into the building pulled a gun on him and robbed him of his .38 caliber pistol and an amount of money. Harris testified under oath at the preliminary hearing that the Petitioner and his brother, Dennis Eugene Dodson, looked alike and that

he could not definitely say which one came into the store and pulled the gun on him. (Preliminary Hearing Transcript, R. 29, 32) Harris further testified at the preliminary hearing that the one in the picture, State's Exhibit No. 1, a photograph of Dennis Eugene Dodson, the co-defendant and the Petitioner's brother, was definitely the one who pulled the gun on him. (Preliminary Hearing Transcript, R. 31) Harris further testified that after the Petitioner and his brother were apprehended, he remembered seeing both of them at the Jail at the same evening of the alleged crime after they had been arrested. (Preliminary Hearing Transcript, R. 31)

Evelyn Harris testified at the preliminary hearing first that the Petitioner was the one who came into the store and robbed her. (Preliminary Hearing Transcript, R. 39, 40) Later on cross-examination, however, Mrs.

Harris testified at the preliminary hearing as follows:

"Q: And you say that this person here (indicating to Defendant) came in the store?

"A: (Nods head yes.)

"Q: Now, could it have been that person in this picture?

"A: This is the person that come in the store (indicating to picture). (Preliminary Hearing Transcript, R. 42)

Mrs. Harris was further cross-examined at the Preliminary Hearing by Counsel for the Defendant and testified as follows:

"Q: But you can't say, today, whether it was this person here (indicating

to Defendant) or this one (indicating to picture) that came into the store?

"A: Well --

"Q: If I told you these were two different people, now which one came into the store?

"A: Well, this is the one (indicating to picture), for that's the same shirt." (Preliminary Hearing Transcript, R. 46)

The attorney for the State at this preliminary hearing in an attempt to clarify the questionable identification asked the State's eye-witness the following questions:

"Q: Now, Mrs. Harris, one more time, I mark this photograph State's Exhibit

No. 1, now this is the person you said was in the store, is that correct?

"A: That's right.

"Q: And you identify him, first of all, by his special look and also by the shirt he is wearing, is that correct?

"A: Yes, sir."

(Preliminary Hearing Transcript, R. 47)

James Crisp, the chief investigating officer and the prosecutor in the case, testified at the preliminary hearing that Guy Harris came to the Jail the same day of the alleged crime in the evening and that although there was no "line-up," Harris saw the "two boys" sitting in the office of the chief deputy, and that, "Really, it was just an accident." (Preliminary Hearing Transcript, R. 58)

Crisp also testified that he took witness statements from both Mr. and Mrs. Harris on September 26, 1975, two days after the commission of the alleged crime, and at that time both of the State's eye-witnesses identified the Petitioner's brother from photographs, as the one who had come into the store and had robbed Mr. Harris. (Preliminary Hearing Transcript, R. 58)(Emphasis Supplied)

The Trial of the Petitioner on March 16, 1976, was held five months after the preliminary hearing. The testimony of the two State's eye-witnesses changed radically from that given at the preliminary hearing! Mr. Harris testified that on September 24, 1975, the man who had come into the building and pulled a gun on him and robbed him was the Petitioner, "That one right there (indicating)." (T. 16) Mr. Harris testified on numerous occasions at this trial, throughout

his testimony on direct examination, contrary to his previous testimony at the Preliminary Hearing, that Petitioner was the one who had robbed him and had come into the station from the van on September 24, 1975. (T. 14, 15, 20, 21)

On cross-examination, appointed Counsel for the Petitioner attempted to impeach the testimony of Mr. Harris by showing in the presence of the Jury that Harris had made inconsistent statements at the preliminary hearing while under oath. The following then occurred in the presence of the Jury:

> "Q: Let me ask you this, Mr. Harris. I want you to think back to this particular time, are you sure that this is the one that came in the store and had the gun on you?
>
> "A: That's the one (indicating).

> "Q: Do you remember back some time when we had a preliminary hearing on this thing?
>
> "A: Yes, sir, his brother by God, was up here then, that was his brother." (T. 29)
>
> (Emphasis Supplied)

That was not his brother at the preliminary hearing, but the Jury would never know that! Appointed Counsel for the Petitioner only attempted on one occasion to impeach the testimony of Mr. Harris, and was thwarted in his efforts to do so by an objection by the District Attorney that he was not laying the proper foundation for impeachment by an inconsistent statement or testimony. (T. 29, 30) When the objection was sustained by the Court that the proper foundation had not been laid, appointed Counsel made no further efforts to impeach the witness

Mr. Harris by showing his inconsistent testimony at the preliminary hearing or his statement to Investigator Crisp identifying his brother as the one who had held the gun on him. (T. 29, 30) Mr. Harris, who was obviously mistaken in his identification and recollection of this entire affair made the following statement when asked how many times he had seen "these people:"

> "I -- this is the first time I've seen him, yesterday was the first time I've seen him until that day. I seen his brother at the preliminary trial."
> (T. 29, 30)

Once again, that was not his brother, but the Petitioner as reflected by the record, but this was never established in the presence of the Jury.

Mrs. Evelyn Harris was called as a State's witness and testified substantially to the same facts as had been testified to by her husband previously. She also changed her testimony radically to coincide with his!

> "Q: Alright. And this is the one that went in the store and actually robbed your husband?
>
> "A: That's right.
>
> "Q: Now his brother, mam, you were talking to and drove the truck off, is that right?
>
> "A: (Nods head yes)"
> (T. 37)

On cross-examination, Mrs. Harris testified that she had talked to Investigator Crisp and had picked out the one who had robbed her husband from the pictures

which he showed her. (T. 40) She was then asked the following question on cross-examination:

> "Q: If you had the picture, could you point out the one that came in the store?
>
> "A: When we come up here for a preliminary hearing, why, I pointed out the one. They showed me one that day -- that afternoon." (T. 41)

Once again, she had pointed out the picture of Petitioner's brother, but this was never established in the presence of the Jury. The State's chief prosecutor and investigator in the case, James Crisp, was present in the Courtroom throughout the trial of the case, but was never called by the State of Georgia to testify, and it was never established in the

presence of the Jury that these two eye-witnesses had picked out the photograph of the Petitioner's brother and identified him at the preliminary hearing as the person who had entered the building and robbed Mr. Harris. (T. 20) There were absolutely no objections made to the introduction of the eye-witness' identifications of the Petitioner, and no determination was made by the Trial Judge that the identification of Mr. and Mrs. Harris had an independent origin or whether or not it was tainted by the pre-trial identification procedures used in this case.

REASONS FOR GRANT OF WRIT OF CERTIORARI

WAS THE PETITIONER DEPRIVED OF HIS RIGHT TO A FAIR TRIAL AND TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTI-

TUTION OF THE UNITED STATES WHEN HE WAS SUBJECTED TO A "SHOW-UP" AT THE GORDON COUNTY JAIL APPROXIMATELY ONE-HALF (1/2) HOUR AFTER HIS ARREST AND AFTER THE COMMISSION OF THE ALLEGED OFFENSE, WHICH PROCEDURE WAS SO UNNECESSARILY SUGGESTIVE AS TO RESULT IN MISTAKEN IDENTIFICATION AT THE TRIAL OF THE PETITIONER?

The Supreme Court of Georgia held that under the totality of the circumstances, the show-up which occurred at the Gordon County Jail shortly after the commission of the alleged offense was not impermissibly suggestive, and cited NEIL vs. BIGGERS, 409 U.S. 188 (93 S.Ct. 375, 34 L.E.2d 401) (1972).

In STOVALL vs. DENNO, 388 U.S. 293 (87 S.Ct. 1967, 18 L.E.2d 1199)(1967), this Court held that a Defendant could claim, "That the confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken idenfification that he was denied Due Process of Law." Id., at 301, 302, 87 S.Ct. 1972. Although this Court has held that the determination of this question must be based on the "totality of the circumstances," this Court has further made it clear that any procedure which is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" constitutes a denial of Due Process of Law and is to be condemned. SIMMONS vs. UNITED STATES, 390 U.S. 377, 384 (88 S.Ct. 967, 971, 19 L.E.2d 1247)(1968); FOSTER vs. CALIFORNIA, 394 U.S. 440 (80 S.Ct. 1127, 22 L.E.2d 402)(1969).

The Supreme Court of Georgia in relying upon NEIL vs. BIGGERS, Supra., has completely overlooked the established fact of confusion and the misidentification on the part of both Mr. and Mrs. Harris, the two eye-witnesses at the trial of the case. The Supreme Court of Georgia merely passed over this horrible set of facts by stating, "Apparently they were confused as to which brother was at the hearing and which one was in the picture." (Appendix "A," p. 50) Investigator Crisp testified that he took witness statements from both Mr. and Mrs. Harris on September 26, 1975, two days after the commission of the alleged crime, and that both of the eye-witnesses identified the Petitioner's brother as the person who had come into the store and robbed Mr. Harris. (Preliminary Hearing Record, p. 58) Both Mr. and Mrs. Harris testified at the preliminary hearing that the Petitioner's brother was the one who had come into the building and

robbed Mr. Harris, yet the Supreme Court of Georgia merely says that the show-up under the totality of the circumstances was not impermissibly suggestive. Well, something was wrong and consequently something caused it! In NEIL vs. BIGGERS, Supra., two of the five factors which were listed by the Supreme Court of the United States to be considered in evaluating the likelihood of misidentification were the prior description of the criminal and the level of certainty demonstrated by the witness of the confrontation. In the case sub judice, the prior description and identification of Petitioner's brother by both Mr. and Mrs. Harris and the level of certainty demonstrated by them when they changed their testimony indicates that they were either confused or committed perjury! Obviously, the Petitioner was deprived of a fair trial and to Due Process of Law in this case wherein he was convicted

of armed robbery and sentenced to fifteen years in prison based upon a misidentification and is presently incarcerated as a result of this testimony.

Given the facts and circumstances of this case, and the totality of the circumstances, the Petitioner argues and contends that the record in this case shows a blatant abuse of identification of the Petitioner. This "show-up" was not only unnecessarily suggestive, but eventially led to a total confusion of the identification by the State's witnesses at the trial of the Petitioner.

WAS THE PETITIONER DEPRIVED OF A FAIR TRIAL AND TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES WHEN THE TRIAL JUDGE ADMITTED THE IN-COURT IDENTIFICATION

BY THE EYE-WITNESSES GUY HARRIS AND EVELYN HARRIS WITHOUT FIRST DETERMINING WHETHER OR NOT IT WAS TAINTED BY THE ILLEGAL "SHOW-UP" AND OTHER IDENTIFICATION PROCEDURES OR WHETHER IT HAD AN INDEPENDENT ORIGIN?

Prior to the admission of the in-court identification by the eye-witness Guy Harris and Evelyn Harris, the Trial Judge did not make a determination that the in-court identification was not tainted by the illegal show-up of whether or not it had an independent origin.

In GILBERT vs. STATE OF CALIFORNIA, 388 U.S. 263 (87 S.Ct. 1951, 18 L.E.2d 1178) (1967), this Court held, "The admission of the in-court identifications without first

determining that they were not tainted by the illegal line-up, but were of independent origin was constitutional error." Supra., at 272, Supra., 1956. Neither of the State's two eye-witnesses testified that their identification of the Petitioner was made independently of the show-up which had occurred at the Gordon County Jail or the photographs shown to them by Investigator Crisp, and the confrontations which had occurred at the preliminary hearing and proceedings in the case. The State has, therefore, utterly failed to establish that the in-court identification was not tainted by the prior illegal identification procedures used in this case, and the Petitioner urges to this Court that the failure of the State of Georgia to do so constitutes a deprivation of the Petitioner's right to a fair trial and to Due Process of Law under the Fifth and Fourteenth

Amendments to the Constitution of the United States. UNITED STATES vs. WADE, 388 U.S. 218 (87 S.Ct. 1926, 18 L.E.2d 1149) (1967); STOVALL vs. DENNO, Supra.; SIMMONS vs. UNITED STATES, Supra.

WAS THE PETITIONER DEPRIVED OF HIS RIGHT TO A FAIR TRIAL AND TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES WHEN THE DISTRICT ATTORNEY KNOWINGLY USED PERJURED TESTIMONY BY TWO EYE-WITNESSES WHO MISIDENTIFIED THE PETITIONER AT THE TRIAL, AS THE PERPETRATOR OF THE ARMED ROBBERY WHEN THEY HAD PREVIOUSLY IDENTIFIED HIS BROTHER, A CO-DEFENDANT,

IN STATEMENTS TO THE
CHIEF INVESTIGATOR AND
AT A PRIOR PRELIMINARY
HEARING?

The record in this case indicates that both Evelyn Harris and Guy Harris rendered statements to Investigator James Crisp and testified at a preliminary hearing held on the 23rd day of October, 1975, less than one month after the commission of the alleged crime, that the Petitioner's brother was the person who had come into the store and had robbed Guy Harris at the point of a gun. (Preliminary Hearing Transcript, R. 28, 29, 32, 46, 47, 58) However, at the trial of the case, these two witnesses changed their testimony radically and pointed out and identified the Appellant as the one who had gone into the building and robbed Guy Harris. Both of these witnesses were under oath at the Preliminary Hearing and at the trial, and their

testimony at the trial was in direct and complete contradiction to their testimony at the preliminary hearing. Both of these witnesses, who were the State's eye-witnesses, identified the Petitioner at his trial as the one who had gone into the store and robbed Mr. Harris. The State of Georgia, acting by and through the District Attorney, made absolutely no effort to correct the record or to protect the Petitioner, but on the contrary, as shown by the transcript, vigorously frustrated and opposed appointed counsel's attempts to impeach Mr. Harris. (T. 29, 30) It is also interesting to note that the State of Georgia never called Investigator Crisp to the witness stand, although he was present in Court and was the Prosecutor in the case. (T. 20)(Emphasis Supplied) Why? Could it be the District Attorney

feared this materially favorable testimony would come out?

The Petitioner argues to this Court that the office of the District Attorney is not solely that of an adversary or advocate, especially when there is testimony rendered in the trial of a case which is highly suspect and is patently false and contradictory! In such a case, the District Attorney has an obligation and duty to the Court and Jury and to the person accused of crime to correct the record and to set forth the materially favorable evidence for the Petitioner, even if it hurts the State's case. Instead, the District Attorney in this case attempted to frustrate counsel's feeble efforts to impeach Guy Harris and successfully hid this glaringly inconsistent testimony from the Jury and from the Court with the tragic result that Petitioner was convicted

and sentenced to fifteen (15) years in the penitentiary.

The Supreme Court of the United States in MOONEY vs. HOLOHAN, 294 U.S. 103 (55 S.Ct. 340, 79 L.E.2d 791)(1934), held that the "knowing use of false evidence and deliberate deception of the Court and jurors is incompatible with 'rudimentary demands of justice.'" Since the decision by the Supreme Court of the United States in MOONEY, Supra., there have been others that hold that a prosecuting attorney cannot merely sit there and permit false testimony to remain uncorrected as was done in this case. ALCORTA vs. TEXAS, 355 U.S. 28 (78 S.Ct. 103, 2 L.E.2d 9)(1957); BRADY vs. MARYLAND, 373 U.S. 83 (83 S.Ct. 1194)(1963); MILLER vs. PATE, 386 U.S. 2 (87 S.Ct. 785) (1967); GILES vs. MARYLAND, 386 U.S. 66 (87 S.Ct. 793, 17 L.E.2d 737)(1967); GIGLIO vs. UNITED STATES, 405 U.S. 150 (92 S.Ct. 763, 31 L.E.2d 104)(1972);

MOORE vs. ILLINOIS, 408 U.S. 786 (92 S.Ct. 2562, 33 L.E.2d 706)(1972).

In NAPUE vs. ILLINOIS, 360 U.S. 264 (79 S.Ct. 1173, 3 L.E.2d 1217)(1959), this Court held that:

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The Jury's estimate of the truthfulness and reliability of the given witness may well be determinative of the guilt or innocence, and it is upon such subtle

> factors as the possible interest of the witness in testifying falsely that a Defendant's life or liberty may depend."
> 360 U.S. 264, 269.

What this Court said most eloquently in BERGER vs. UNITED STATES, 295 U.S. 87 (1935), is most certainly applicable in this case. The Supreme Court of the United States in that case stated:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal

prosecution, is not that it shall win a case, but the justice shall be done. As such, he is in a peculiar and a very definite sense a servant of the law, the two-fold aim of which is that guilt shall not escape and innocence suffer. He may prosecute with earnestness and vigor -- indeed he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to

bring about a just one." (Emphasis Supplied)

Petitioner in this case has been struck a "foul blow" by the District Attorney's inaction and failure to properly advise the Court and the jurors as to the contradictions and inconsistencies in the statements made by the State's witnesses. The Petitioner urges to this Court that this constitutes a violation of Petitioner's right to Due Process of Law and a fair trial under the Fifth and Fourteenth Amendment to the Constitution of the United States, and requires a reversal of his conviction and that a new trial be granted.

WAS THE PETITIONER DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT TO THE CONSTI-

TUTION OF THE UNITED STATES
AND TO A FAIR TRIAL UNDER
THE FIFTH AND FOURTEENTH
AMENDMENTS TO THE CONSTI-
TUTION OF THE UNITED
STATES WHEN HIS ATTORNEY
FAILED TO PROPERLY IMPEACH
THE STATE'S TWO EYE-WITNESSES
AND TO INTRODUCE EVIDENCE
OF AN EXCULPATORY NATURE
WHICH WOULD HAVE BEEN MATERIALLY
FAVORABLE TO THE PETITIONER
AND TO MAKE AN OBJECTION
TO THE EYE-WITNESS IDENTI-
FICATION SO AS TO PRESERVE
THAT ISSUE FOR APPEAL.

The Petitioner argues and contends that his appointed counsel at the trial of the case before the Jury, rendered him ineffective assistance of Counsel, in that his attorney at said trial failed to properly impeach the State's two eye-

witnesses and to introduce evidence which was of an exculpatory nature and which was materially favorable to the Petitioner. Both Guy Harris and Evelyn Harris gave statements to Chief Investigator James Crisp in which they identified the Petitioner's brother, a co-defendant, as the one who went into the building and robbed Mr. Harris. (Preliminary Hearing Transcript, R. 58) At the preliminary hearing held less than one month after the alleged crime, both Guy Harris and Evelyn Harris testified under oath that it was the Petitioner's brother and not the Petitioner who robbed Mr. Harris. (Preliminary Hearing Transcript, R. 28, 29, 32, 46, 47, 58) Both of these witnesses changed their testimony at the Petitioner's trial and testified it was the Petitioner who got out of the van and went into the store and robbed Mr. Harris. (T. 14, 15, 16, 20, 21, 37, 41)

The trial transcript including all evidence and the charge of the Court in this case is seventy-three (73) pages. Although counsel attempted to cross-examine Mr. Harris and to lay the foundation for the introduction for inconsistent testimony, he was prevented from doing so by the District Attorney's objection that the proper foundation had not been laid. Thereafter, appointed counsel failed to proceed in his efforts to impeach Mr. Harris. (T. 29, 30) When Mrs. Harris testified differently from her previous testimony, Counsel for Petitioner made absolutely no attempt to impeach her! Despite these glaring failures on the part of counsel, the Supreme Court of Georgia in its opinion at headnote (4) by Justice Hill held that "Trial counsel adequately cross-examined the victims as to the identity of the Defendant and his brother without use of

the earlier transcript." (Appendix "A," Page 49) Counsel for Petitioner made no objection to the introduction of this changed identification testimony and did not insist upon the Court making any prior determination as to whether or not the changed identification testimony had an independent origin or whether it was tainted by the prior illegal identification procedures used in this case. The Supreme Court of Georgia in its opinion at headnote (3) held:

> "There having been no motion to suppress or objection to the identification testimony, any preliminary judicial determination required by Gilbert vs. California, 388 U.S. 263 (87 S.Ct. 1951, 18 L.E.2d 1178)(1967) was unnecessary here." (Appendix "A," Page 49)

The identification of the Petitioner was absolutely essential to the State's case and this prosecution for Armed Robbery. The testimony by Guy Harris and Evelyn Harris was, therefore, critical to the State's case against the Petitioner, and the Petitioner's impeachment of these eye-witnesses and their identification of him was vital to his defense. There can be absolutely no doubt that Mr. and Mrs. Harris were mistaken in their in-court identification and that they both thought they were identifying the Petitioner's brother, the person depicted in State's Exhibit No. 1 at the Preliminary Hearing. (T. 29, 30, 41)(Emphasis Supplied)

The contradictory statements and previous testimony given by both Guy Harris and Evelyn Harris was clearly admissible under GA. CODE ANNO. §38-1803 for impeachment purposes. Neither can it

be said that the failure of the counsel for the Appellant to impeach them was harmless error since under the provisions of GA. CODE ANNO. §38-1806, if the Jury determined that these two witnesses were swearing falsely to a material matter, the Jury could disregard their testimony entirely.

Under our system of law, a person accused of crime is entitled to the effective assistance of counsel under the Sixth Amendment to the Constitution of the United States and this amendment has been made applicable to the State by virtue of the Fourteenth Amendment to the Constitution of the United States. POWELL vs. ALABAMA, 287 U.S. 45 (53 S.Ct. 55, 77 L.E.2d 158)(1932). To the extent that the attorney renders his client ineffective assistance of Counsel, the scales of justice are tilted in favor of the prosecution. To that

extent the adversary system is no longer functional and the judicial process is thwarted and the record before this Court is an excellent example of the tragic results which follow in such a case! For the record in this case shows without any doubt that two witnesses, who were material witnesses for the State without whose testimony the State could not proceed, gave inconsistent statements to Investigator Crisp and testified under oath on October 23, 1975, at a preliminary hearing that the Petitioner's brother committed the crime charged, and then at Petitioner's trial they testified to the exact opposite on March 16, 1976! The tragedy of it all is that these glaring contradictions were never presented to the trier of fact for them to properly assess and judge the in-court identification of the Petitioner in order to determine Petitioner's guilt or innocence! This

Court cannot tolerate this and must reverse this case and remand it to the Gordon County Superior Court for another trial in order that the Petitioner may be afforded effective assistance of counsel to properly cross-examine and reveal the falsity of the identification testimony in accordance with Due Process of Law. To do otherwise would indeed be a mockery of justice! McMANN vs. RICHARDSON, 397 U.S. 772 (90 S.Ct. 1441, 1449)(1970); MACKENNA vs. ELLIS, 280 F.2d 592, 599 (5th Cir. 1960); FITZGERALD vs. ESTELLE, 505 F.2d 1334 (5th Cir. 1974). As was said in MACKENNA, Supra.:

> "A genuflection in the direction of justice by the pro forma appointment of Counsel such as Mackenna had is something less than adequate judicial guidance, and the furnishing of

effective counsel to an accused." Supra., p. 601.

The failure of an attorney to present a defense or to otherwise bring forth important evidence has been held to be ineffective assistance of counsel, in that it affects the fairness of the trial. WILSON vs. PHEND, 417 F.2d 1197 (7th Cir. 1969); KIBERT vs. PEYTON, 383 F.2d 566 (1967).

Appointed Counsel in this case failed to properly raise the issues as to identification prior to the introduction of the in-court identification and further failed to adequately cross-examine the State's two eye-witnesses and to produce materially favorable evidence to the Petitioner thereby depriving him of reasonably effective assistance of Counsel under the Sixth Amendment to the Constitution of the United States and his right to Due Process of Law and a fair trial under the Fifth

and Fourteenth Amendments to the Constitution of the United States, which deprivations require a reversal of his conviction and the grant of a new trial.

CONCLUSION

The judgment and opinion of the Supreme Court of Georgia are a unique and unusual departure from the decisions of this Court and represent a breach in the wall of Due Process under the Fifth and Fourteenth Amendments to the Constitution of the United States and a deprivation of the Petitioner's Sixth Amendment right to effective assistance of Counsel, which constitutional rights protect every citizen from being convicted wrongfully as in this case upon the misidentification by State's witnesses by testimony which subverts the truthfinding process of our judicial system. Against these prosecutorial and judicial abuses

this high Court must set its face. We urge that this Court issue the Writ of Certiorari to the Supreme Court of Georgia to review the Judgment of the Supreme Court of Georgia in this case.

RESPECTFULLY SUBMITTED,

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WM. RALPH HILL, JR.

ATTORNEY FOR PETITIONER

In the Supreme Court of Georgia

Decided: SEP 08 1976

31332. DONNIE WAYNE DODSON v.

THE STATE

HILL, Justice.

Donnie Wayne Dodson appeals from an armed robbery conviction and fifteen year sentence imposed by the Gordon County Superior Court.

The evidence presented at trial authorized the jury to find that the defendant and his brother, who resembles the defendant, drove into a service station in Gordon County in a white van on September 24, 1975. While the owner's wife was putting gas in the van, the defendant forced the owner at gunpoint to put $125 and the owner's .38 caliber pistol in a brown bag. As the two men fled in their van the wife noted the license number. The robbery was reported to the police and shortly thereafter a

white van with the reported license number was stopped. A search of the car revealed a brown bag containing $125 and two guns, one of which was the owner's.

Later that same evening the owner saw the defendant and his brother at the county jail and identified them. At the defendant's trial he was identified by both the owner and his wife as the robber. The jury found the defendant guilty of armed robbery.

1. The defendant contends that the brown bag and its contents were taken from the van in an illegal search and seizure because no search warrant was obtained. There was probable cause to arrest the men in the van and probable cause to search the van for guns and the money. The evidence seized from the van was not inadmissible. Chambers v. Maroney, 399 U.S. 42, 52 (90 SC 1975, 26 LE2d 419)(1970).

2. The defendant argues that the "show-up" at the Gordon County jail at which the service station owner identified the defendant was so impermissibly suggestive as to taint the in-court identification. Under the totality of the circumstances we do not find the show-up to be impermissibly suggestive. Neil v. Biggers, 409 U. S. 188 (93 SC 375, 34 LE2d 401)(1972).

3. Defendant enumerates as error the absence of counsel at the show-up. This was not error because adversary judicial criminal proceedings had not yet begun. Kirby v. Illinois, 406 U. S. 682 (92 SC 1877, 32 LE2d 411)(1972). There having been no motion to suppress or objection to the identification testimony, any preliminary judicial determination required by Gilbert v. California, 388 U. S. 263 (87 SC 1951, 18 LE2d 1178) (1967), was unnecessary here.

4. The owner of the service station

and his wife identified the defendant as a participant in the robbery at a preliminary hearing and again at trial. At the preliminary hearing the victims were shown a picture of the brother. Apparently they were confused as to which brother was at the hearing and which one was in the picture. The defendant uses this confusion on the part of the elderly victims as a basis for arguing that the prosecution knowingly used perjured testimony at trial. He also argues ineffective assistance of counsel based on the failure of the defendant's trial counsel to impeach the eye-witnesses by use of the transcript of the preliminary hearing to show the prior identification of the picture of the brother. In addition, he argues that the prosecutor's objection to defense counsel's cross-examination had the effect of concealing the alleged perjury of the witnesses.

We disagree with these arguments. The transcripts do not support the proposition that there was perjury on the part of the victims, nor does our examination show ineffective assistance of counsel. Trial counsel adequately cross-examined the victims as to the identity of the defendant and his brother without use of the earlier transcript. His decision not to refer to the transcript does not show ineffective assistance of counsel.

5. Finally the defendant contends that the court erred in failing, without request, to charge the jury on the general definition of a crime, Code Ann. § 26-601, and that intention is a question of fact and will not be presumed, Code Ann. § 26-605. The charge given to the jury defined the crime charged, armed robbery. The court instructed the jury that mere presence at the scene of a crime, without participation, will not authorize a

conviction, and explained the requirement of intent of a party to participate in a crime. We find no error.

Judgment affirmed. All the justices concur, except Gunter, J. who concurs in the judgment only.

SUPREME COURT OF GEORGIA

Atlanta, September 28, 1976

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Donnie Wayne Dodson v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

Clerk's Office, Atlanta,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

(SEAL) Deputy Clerk

IN THE SUPREME COURT OF GEORGIA

DONNIE WAYNE DODSON,
APPELLANT

-versus- DOCKET CASE #31,332

STATE OF GEORGIA,
APPELLEE

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Now Comes, DONNIE WAYNE DODSON, Appellant in the above named and stated matter, and within the time provided by law files this Notice of Appeal to the Supreme Court of the United States from the decision of the Supreme Court of Georgia rendered on September 8, 1976, affirming the conviction of the Appellant DONNIE WAYNE DODSON. The Appellant filed a Motion for Rehearing on September 14, 1976, and the Supreme Court of Georgia denied said Motion for Rehearing on September 28, 1976.

This appeal is taken to the Supreme Court of the United States pursuant to Article III, Section II, of the Constitution

of the United States and Title 28 United States Code 1257(1) and 1257(2).

THIS 12th day of October, 1976.

WM. RALPH HILL, JR.
Attorney at Law
P. O. Box 1350
LaFayette, Georgia
30728

s/Wm. Ralph Hill, Jr.
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the within and foregoing Notice upon The Honorable David N. Vaughn, Jr., District Attorney, P. O. Box 534, Cartersville, Georgia 30120, and upon The Honorable Arthur Bolton, Attorney General, Judicial Building, Room 132, Atlanta, Georgia 30334, by placing copies of same in properly addressed envelopes in the United States Mails with sufficient postage thereon to reach their destinations.

THIS 12th day of October, 1976.

s/Wm. Ralph Hill, Jr.
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

This is to certify that I have this date served copies of the within and foregoing Petition for Writ of Certiorari to the Supreme Court of the State of Georgia upon the following by placing copies of same in properly addressed envelopes and depositing them in the United States Mails, which said office is within 500 miles from the United States Post Office, to wit:

The Honorable Charles Crawford
District Attorney
Cherokee Judicial Circuit
Cartersville, Georgia 30120

The Honorable Arthur K. Bolton
Attorney General of Georgia
Judicial Building, Room 132
Atlanta, Georgia 30334

THIS 22nd day of December, 1976.

WM. RALPH HILL, JR.
Attorney for Petitioner